

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARC HONIGMAN, Individually and on : Civil Action No. _____
Behalf of All Others Similarly Situated, :
Plaintiff, : CLASS ACTION
vs. : COMPLAINT FOR BREACH OF EXPRESS
APPLE, INC., : WARRANTY, NEGLIGENT
Defendant. : MISREPRESENTATION, INTENTIONAL
: MISREPRESENTATION, UNJUST
: ENRICHMENT AND VIOLATIONS OF
: NEW YORK GENERAL BUSINESS LAW

x DEMAND FOR JURY TRIAL

Plaintiff Marc Honigman (“Plaintiff” or “Mr. Honigman”), individually and on behalf of all others similarly situated, brings this Class Action Complaint against defendant Apple Inc. (“Apple” or “Defendant”), and alleges as follows:

NATURE OF THE ACTION

1. This is a consumer class action brought by Plaintiff on behalf of himself and all others similarly situated who acquired, in the United States and its territories and its protectorates, Apple’s iPhone 6, 6 Plus, 6s, 6s Plus, SE, 7, 7 Plus, 8 and 8 Plus (collectively, the “iPhone Devices”) and experienced reduced functionality on their devices due to Apple’s iOS updates.

2. Since its debut, Apple has touted the superior performance of the iPhone and marketed these devices as high speed and high capability smartphones. Updates for Apple’s mobile operating system, iOS, are continually released to iPhone customers. There have been numerous versions of iOS since iPhones were initially released, each with multiple iterations.¹ The latest iOS version is iOS 11.2.1, which was released on December 13, 2017.² The iOS downloads purportedly update and improve the performance of iPhones, preserve the security of the devices, and make the devices compatible with the newest and most up-to-date programs and applications.

3. iPhone users have reported reduced functionality on their iPhones as a result of Apple’s iOS updates since as far back as 2010.³ For example, users reported battery drain with the download of iOS 5;⁴ iOS 6 presented users with Bluetooth and cellular network problems;⁵ iOS 7

¹ https://en.wikipedia.org/wiki/IOS_version_history#cite_note-193 (last visited on January 3, 2018).

² *Id.*

³ *Id.*

⁴ <https://www.engadget.com/2011/11/02/apple-confirms-ios-5-bugs-causing-battery-drain-promises-a-fix/> (last visited on January 3, 2018).

users experienced battery drainage issues;⁶ iOS 8 triggered performance issues on older devices;⁷ and iOS 9 was impacted by a bug called “Error 53” wherein devices that have had the touch ID sensor replaced by a repair shop fail.⁸

4. In late 2016, iPhone users reported sudden shutdowns of iPhones 5 and 6 running versions of iOS 10 software.⁹ In February of 2017, Apple claimed that it had almost entirely resolved the issue in its latest 10.2.1 iOS update, however users still complained of slow devices.¹⁰

5. Speculation regarding the manner in which iOS updates impair iPhones and the functionality of iPhone features has existed for several years.¹¹

6. For example, on Appleinsider.com, one poster theorized as to the cause of slowdowns in the iPhone 6 as follows: “At present, the theory is that the iOS 10.2.1 update issued in part to rectify iPhone 6 shutdown issues with a low-power battery condition implemented some kind of down-clocking routing to slow the processor in afflicted devices.”¹²

⁵ <https://discussions.apple.com/thread/4318307?start=0&tstart=0> (last visited on January 3, 2018).

⁶ <https://9to5mac.com/2014/03/13/ios-7-1-makes-everything-faster-including-your-battery-drain/> (last visited on January 3, 2018).

⁷ https://en.wikipedia.org/wiki/IOS_version_history#iOS_8_2 (last visited January 3, 2018).

⁸ <https://www.cultofmac.com/413066/apple-apologizes-for-error-53-releases-fix/> (last visited on January 3, 2018).

⁹ <https://discussions.apple.com/message/30989226?start=165&tstart=0> (last visited on January 3, 2018).

¹⁰ <https://discussions.apple.com/thread/7669667> (last visited on January 3, 2018).

¹¹ <http://blackbag.gawker.com/does-apple-ruin-your-iphone-on-purpose-the-conspiracy-1690649898> (last visited on January 3, 2018).

¹² <http://appleinsider.com/articles/17/12/11/apple-may-fix-aging-battery-issues-prevent-random-shutdowns-by-slowing-down-iphones> (last visited on January 3, 2018).

7. On December 18, 2017, in a report by Primate Labs, blogger John Poole plotted the performance of the iPhone 6s and iPhone 7 before and after the iOS fix and stated that Apple was deliberately slowing the performance of its devices. Poole further explained that he “believe[d] (as do others) that Apple introduced a change to limit performance when battery condition decreases past a certain point.”¹³

8. On December 20, 2017, in response to widespread speculation about the impact of iOS 10 on iPhone performance, Apple confirmed users’ long-held suspicions and finally admitted that its latest iOS software updates deliberately slowed the performance of iPhones.

9. Apple wrongfully released iOS updates which, unbeknownst to consumers, reduced the functionality of the iPhone Devices and forced users to incur expenses replacing these devices. Moreover, Apple’s representations about the iPhone Devices and the iOS updates failed to disclose to consumers the damaging impact the updates may have on iPhone Devices thereby causing Plaintiff and the Class members damages.

JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to 28 U.S.C. §1332(a)(1) as modified by the Class Action Fairness Act of 2005, because at least one member of the Class is a citizen of a different state than Defendant, there are more than 100 members of the Class, and the aggregate amount in controversy exceeds \$5,000,000.00, exclusive of interest and costs.

11. Pursuant to 28 U.S.C. §1391(b), venue is proper in this District because a substantial part of the events or omissions giving rise to the claims occurred in this Judicial District and Defendant does business throughout this District. Moreover, venue is proper per 28 U.S.C. §1391(b) because Plaintiff purchased and activated his iPhone 6 in this District.

¹³ <http://www.geekbench.com/blog/2017/12/iphone-performance-and-battery-age/> (last visited on January 3, 2018).

PARTIES

12. Plaintiff Marc Honigman is a citizen and resident of the State of New York. Mr. Honigman believes that the slowdown of his iPhone 6 occurred in connection with the download of iOS 10 software.

13. Defendant Apple is a California corporation with its headquarters and principal place of business in Cupertino, California. Apple is the designer and manufacturer of the iPhone and iOS software.

SUBSTANTIVE ALLEGATIONS

Background

14. Apple manufactures, designs, produces, and sells several types of electronic products, including, among others, personal computers, portable music players, cellular phones, and other communication devices. Apple currently has over 450 retail stores in 13 countries, as well as an online store that sells these electronic devices.

15. Apple debuted the iPhone in 2007.¹⁴ Since the first generation iPhone, Apple has released at least one new iPhone model every year: the iPhone 3G in 2008, the 3GS in 2009, the 4 in 2010, the 4s in 2011, the 5 in 2012, the 5c and 5s in 2013, the 6/6 Plus in 2014, the 6s and 6s Plus in 2015, the SE in March 2016, the 7/7 Plus in September 2016, the 8/8 Plus in September 2017 and the X in November 2017.¹⁵

¹⁴ [\(last visited on January 3, 2018\).](https://en.wikipedia.org/wiki/IPhone_(1st_generation))

¹⁵ [\(last visited on January 3, 2018\).](https://en.wikipedia.org/wiki/IPhone)

16. Apple has consistently marketed the iPhone Devices as possessing impressive functioning speed and power efficiency. For instance, in reference to the iPhone 5, Apple's website stated, as follows:¹⁶

- **Ultrafast wireless.**
With support for the latest wireless technologies, iPhone 5 connects to more networks all over the world.* And Wi-Fi is faster, too. So you can browse, download, and stream content at remarkable speeds, wherever you happen to be.
- **Powerful A6 chip.**
The all-new Apple-designed A6 chip in iPhone 5 is powerful but not power hungry. CPU performance and graphics performance are up to twice as fast as on the A5 chip. But even with all that speed, iPhone 5 gives you outstanding battery life.

17. Likewise, in reference to the iPhone 6, 7, 8 and X, Apple's website stated the following:¹⁷

- **iPhone 6:** Faster wireless.
Far and wide.

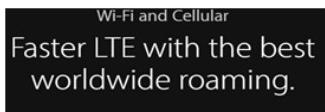
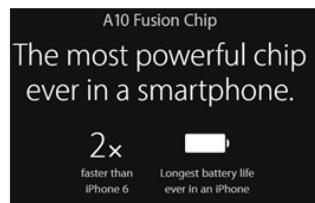
iPhone 6 has faster LTE download speeds,* and it supports more LTE bands than any other smartphone so you can roam in more places. And when connected to Wi-Fi, you'll get up to 3x faster speeds.

¹⁶ <https://web.archive.org/web/20120922034249/http://www.apple.com/iphone/> (last visited January 3, 2018).

¹⁷ iPhone 6 (<https://web.archive.org/web/20140926233000/https://www.apple.com/iphone-6/>); iPhone 7 (<https://web.archive.org/web/20160924053528/http://www.apple.com/iphone-7/>); iPhone 8 (<https://www.apple.com/iphone-8/>); iPhone X (<https://www.apple.com/iphone-x/>) (last visited January 3, 2018).

- **iPhone 7:**

iPhone 7 dramatically improves the most important aspects of the iPhone experience. It introduces advanced new camera systems. The best performance and battery life ever in an iPhone. Immersive stereo speakers. The brightest, most colorful iPhone display. Splash and water resistance.¹ And it looks every bit as powerful as it is. This is iPhone 7.



- **iPhone 8:**

Faster CPU

Introducing A11 Bionic. With four efficiency cores that are up to 70 percent faster than A10 Fusion. And two performance cores that are up to 25 percent faster.

Power Efficiency

A second-generation performance controller provides more power when you need it. While delivering the same great battery life.⁴

- **iPhone X:**

Faster CPU	The four efficiency cores in the all-new CPU are up to 70 percent faster than A10 Fusion. And the two performance cores are up to 25 percent faster.
Power Efficiency	A second-generation performance controller and custom battery design that lasts up to two hours longer between charges than iPhone 7. ⁵
Apple-Designed GPU	The new Apple-designed three-core GPU is up to 30 percent faster than A10 Fusion.

18. Every iPhone device comes equipped with a mobile operating system called iOS. iOS consists of a collection of software applications, known as “Apps,” that allows users to utilize all of the features of Apple products.

19. Since the iPhone was first released, there have been many versions of iOS, the most recent being iOS 11.¹⁸ Users are prompted to download the newest iOS version onto their iPhone device via a message from Apple when it is released. A chart reflecting the release dates of several of the iPhone models and the corresponding iOS updates are depicted below:¹⁹

Date	iOS	iPhone Model
September 19, 2012	iOS 6 was released	
September 21, 2012		iPhone 5 was released
September 18, 2013	iOS 7 was released	
September 20, 2013		iPhone 5c and 5S was released
September 17, 2014	iOS 8 released	
September 19, 2014		iPhone 6/6 Plus released
September 16, 2015	iOS 9 released	

¹⁸ https://en.wikipedia.org/wiki/IOS_version_history (last visited January 3, 2018).

¹⁹ *Id.*

Date	iOS	iPhone Model
September 23, 2015	iOS 9.0.1 released	
September 25, 2015		iPhone 6S and 6S Plus released
September 30, 2015	iOS 9.02 released	
October 21, 2015	iOS 9.1 released	
December 8, 2015	iOS 9.2 released	
January 19, 2016	iOS 9.2.1 released	
March 21, 2016	iOS 9.3 released	
March 31, 2016	iOS 9.3.1 released	iPhone SE released
May 16, 2016	iOS 9.3.2 released	
July 18, 2016	iOS 9.3.3 released	
August 4, 2016	iOS 9.3.4 released	
August 25, 2016	iOS 9.3.5 released	
September 13, 2016	iOS 10 released	
September 16, 2016		iPhone 7/7 Plus released
September 23, 2016	iOS 10.0.2 released	
October 17, 2016	iOS 10.0.3 released	
October 24, 2016	iOS 10.1 released	
October 31, 2016	iOS 10.1.1 released	
December 12, 2016	iOS 10.2 released	
January 23, 2017	iOS 10.2.1 released	
March 27, 2017	iOS 10.3 released	
April 3, 2017	iOS 10.3.1 released	
May 15, 2017	iOS 10.3.2 released	
July 19, 2017	iOS 10.3.3 released	
September 19, 2017	iOS 11 released	
September 22, 2017		iPhone 8/8 Plus released
September 26, 2017	iOS 11.01 released	
October 3, 2017	iOS 11.0.2 released	
October 11, 2017	iOS 11.0.3 released	
October 31, 2017	iOS 11.1 released	
November 3, 2017		iPhone X released
November 9, 2017	iOS 11.1.1 released	

Date	iOS	iPhone Model
November 16, 2017	iOS 11.1.2 released	
December 2, 2017	iOS 11.2 released	
December 13, 2017	iOS 11.2.1 released	

20. iPhone users are continually prompted to download the most recent version of iOS software. If users elect to ignore these constant reminders, the device would become incompatible with current Apps and difficult to operate.

21. Apple has consistently represented that its iOS updates improve rather than hinder the performance and security of iPhone Devices. For example, Apple's website states: "Keeping your software up to date is one of the most important things you can do to maintain your Apple product's security."²⁰ Thus, iPhone users are urged to update their devices to add vital security updates and bug fixes necessary for the iPhones to properly function. Users are essentially forced to make a "choice" between leaving their personal data susceptible to hackers and identity thieves, or upgrade their iOS software which remedies serious security breaches. In essence, no reasonable consumer, including Plaintiff, would leave their iPhone vulnerable to security breaches by not upgrading to the new iOS version.

22. Several iOS updates were, in fact, downloaded without the need or opportunity for action or approval by users. For example, iOS 7 automatically downloaded onto iPhone devices.²¹

23. The iOS notifications, which alerts users to update their iPhones, highlight the positive features of iOS updates but fail to inform users of the fact that these updates reduce the functionality of the devices.

²⁰ <https://support.apple.com/en-us/HT201222> (last visited on January 3, 2018).

²¹ <https://www.cnet.com/news/ios-6-holdouts-complain-about-large-unwanted-ios-7-download/> (last visited on January 3, 2018).

24. For example, Apple's website stated that the iOS 7 update contained numerous new features and “[b]ug fixes.”²² Additionally, the notification sent to users to download iOS 7 highlighted the software’s “beautiful new design” and “hundreds of new features.” A depiction of this alert is set forth below:



25. Likewise, with respect to iOS 9, Apple's website stated that the update “has incredible new features to make your experience more seamless, efficient, and enjoyable.”²³ The iOS 9 notification also stated that the software would improve the devices’ functionality and provide critical security features. The iOS 9 notification containing these statements is depicted below:



²² https://support.apple.com/kb/dl1682?locale=en_US (last visited on January 3, 2018).

²³ <https://www.apple.com/lb/support/ios9/> (last visited on January 3, 2018).

26. iPhone users have reported reduced functionality on their iPhones as a result of Apple's iOS updates, claims which Apple has consistently denied. For example, users reported battery drain bugs with the download of iOS 5;²⁴ iOS 6 presented users with Bluetooth and cellular network problems;²⁵ iOS 7 users experienced battery drainage issues;²⁶ iOS 8 triggered performance issues on older devices;²⁷ and iOS 9 was impacted by several issues, including, for example, a bug called "Error 53" wherein devices that have touch ID sensors replaced by a repair shop fail.²⁸

27. In late 2016, iPhone users reported sudden shutdowns of their devices as a result of downloading versions of iOS 10.²⁹ 3,429 members of the Apple discussion group reported that they experienced this same issue.³⁰ In February of 2017, Apple claimed that it had almost entirely resolved the issue in its latest 10.2.1 iOS update. In a statement to TechCrunch, Apple said: "With iOS 10.2.1, Apple made improvements to reduce occurrences of unexpected shutdowns that a small number of users were experiencing with their iPhone."³¹

28. The alert to download iOS 10.2.1, which purportedly repaired iPhones that were shutting down unexpectedly, stated that the update included "bug fixes" and improvements in device security. A depiction of the iOS 10.2.1 notification is set forth below:

²⁴ *Supra* at note 4.

²⁵ *Supra* at note 5.

²⁶ *Supra* at note 6.

²⁷ *Supra* at note 7.

²⁸ *Supra* at note 8.

²⁹ *Supra* at note 9.

³⁰ *Id.*

³¹ <https://techcrunch.com/2017/12/20/apple-addresses-why-people-are-saying-their-iphones-with-older-batteries-are-running-slower/> (last visited January 3, 2018).



29. Apple does not allow iPhone users to revert their iOS software to a previous, better functioning version of iOS. Moreover, Apple does not warn users that these iOS updates are irreversible.

Apple Admits Its Actions

30. iPhone users have speculated that iOS updates impair the functioning of iPhone devices. For example, on December 11, 2017, one poster on Appleinsider.com theorized as to the cause of slow-downs in the iPhone 6, as follows: “At present, the theory is that the iOS 10.2.1 update issued in part to rectify iPhone 6 shutdown issues with a low-power battery condition implemented some kind of down-clocking routing to slow the processor of afflicted devices.”³²

31. On December 18, 2017, in a report by Primate Labs, blogger John Poole plotted the performance of the iPhone 6s and iPhone 7 before and after the iOS fix and stated that Apple was deliberately slowing the performance of its devices. Poole further explained that he “believe[d] (as do others) that Apple introduced a change to limit performance when battery condition decreases past a certain point.”³³

³² *Supra* at note 12.

³³ *Supra* at note 13.

32. On December 20, 2017, Apple finally admitted to this conduct and acknowledged that it had deliberately slowed the performance of older iPhone Devices without users' consent. Apple explained, as follows:

Our goal is to deliver the best experience to customers, which includes overall performance and prolonging the life of their devices. Lithium-ion batteries become less capable of supplying peak current demands when in cold conditions, have a low battery charge or as they age over time, which can result in the device unexpectedly shutting down to protect its electronic components.

Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to smooth out the instantaneous peaks only when needed to prevent the device from unexpectedly shutting down during these conditions. We've now extended that feature to iPhone 7 with iOS 11.2, and plan to add support for other products in the future.³⁴

33. Thus, as Apple has now acknowledged, its software updates purposefully slowed or "throttled down" the performance and speed of iPhones Devices.

34. Plaintiff and Class members were unaware that Apple's iOS 10.2.1 and later updates were engineered to intentionally slow down the performance speed of iPhone Devices or that these updates otherwise had the effect of hindering the devices' functionality.

35. Apple's iOS download notifications and its statements on its website never disclosed to consumers that the slowdown and reduced functionality of older iPhone devices was a planned result of iOS updates. Nor did Apple inform consumers that the shutdown bug that impacted many iPhone Devices might be remedied by replacing the battery in affected devices and avoiding the download of new iOS versions. Battery replacement at the Apple store costs less than \$100, whereas the cost to upgrade to a new iPhone can range between \$200 to \$1,000, depending on the model.

36. When Plaintiff and the Class members bought their iPhone Devices they had a reasonable expectation that these devices would function properly and that performance would not

³⁴ *Supra* at note 31.

be degraded intentionally by Apple. Moreover, Plaintiff and Class members expected that the iPhone Devices were compatible with Apple's own iOS software updates, which it released to users, encouraged, and in some cases, forced to download. Nothing on Apple's website or in its iOS notifications informed consumers of the deleterious impact that iOS software may have on the devices.

37. Apple's intentional degradation of the iPhone Device's performance through the release of iOS impacted the usability of Plaintiff and the Class members' devices. Effectively, Apple has forced the obsolescence of Plaintiff and Class member's iPhones by secretly diminishing their performance. Thus, Apple's admission has confirmed what iPhone users have long suspected – *i.e.*, that Apple deliberately degrades the performance of older iPhone models through iOS updates to encourage users to buy new iPhones. As an article in VOX noted, "the theory goes, Apple intentionally messes with your iPhone, frustrating you and forcing you to shell out money to upgrade."³⁵

38. As set forth further below, Apple's wrongful conduct directly and proximately caused damage to Plaintiff and the Class.

CLASS ACTION ALLEGATIONS

39. Plaintiff brings this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b) on behalf of himself and all others similarly situated as members of the following classes:

New York Class: All users of iPhone Devices in New York who downloaded a version of iOS and who experienced reduced functionality on their device.

³⁵ <https://www.vox.com/2017/12/22/16807056/apple-slow-iphone-batteries> (last visited January 3, 2018).

Nationwide Class: All users of iPhone Devices in the United States who downloaded a version of iOS and who experienced reduced functionality on their device.

New York Post-iOS 10.2.1 Class: All users of iPhone Devices in New York who downloaded iOS 10.2.1 or any later iOS version who experienced reduced functionality on their device.

Nationwide Post-iOS 10.2.1 Class: All users of iPhone Devices in the United States who downloaded iOS 10.2.1 or any later iOS version who experienced reduced functionality on their device.

40. Subject to additional information obtained through further investigation and discovery, the foregoing definition of the Class may be expanded or narrowed by amendment or an amended complaint. Specifically excluded from the proposed Class are Defendant and its officers, directors, agents, trustees, parents, children, corporations, trusts, representatives, employees, principals, servants, partners, joint ventures, or entities controlled by Defendant; its heirs, successors, assigns, or other persons or entities related to or affiliated with Defendant; its directors, or any of them; the Judge assigned to this action; and any member of the Judge's immediate family.

41. ***Numerosity.*** The members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes, and on that basis alleges, that the Class contains millions of members. The precise number of Class members is unknown to Plaintiff. The true number of Class members is known by Defendant, however, and, thus, may be notified of the pendency of this action by first class mail, electronic mail, and by published notice.

42. ***Existence and Predominance of Common Questions of Law and Fact.*** Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual Class members. These common legal and factual questions include, but are not limited to, the following:

- (a) Whether the functionality of the iPhone Devices was reduced as a result of Apple's action on the iPhone Devices;

- (b) Whether the battery life of iPhone Devices was impacted by the download of iOS updates;
- (c) Whether the iPhone Devices' speed was impacted by the download of the iOS updates;
- (d) Whether Defendant was negligent in the design, manufacturing, and distribution of the iPhone Devices;
- (e) Whether Defendant was negligent in the design, manufacturing, and distribution of the iOS software updates;
- (f) Whether Defendant had an obligation to disclose the negative impact of iOS software updates or inform consumers of alternatives to downloading iOS;
- (g) Whether Defendant failed to disclose the negative impact of iOS software updates or inform consumers of alternatives to downloading iOS;
- (h) Whether Defendant violated consumer fraud provisions of New York General Business Law §§349 and 350;
- (i) Whether Defendant breached the terms of its contract, including express warranties, with Plaintiff and the Class by not providing the products as advertised and as a result, have caused damages in the amount of the purchase price of Defendant's product.
- (j) Whether Defendant negligently and recklessly omitted certain material facts regarding the impact of iOS on the iPhone Devices;
- (k) Whether Defendant willfully, falsely and knowingly omitted various material facts regarding the quality and character of the iPhone Devices causing injury and harm to Plaintiff and the Class;
- (l) Whether Plaintiff and members of the Class are entitled to statutory relief;

- (m) Whether Plaintiff and members of the Class are entitled to compensatory relief;
- (n) Whether Plaintiff and members of the Class are entitled to damages, and what is the proper measure of damages; and
- (o) Whether Plaintiff and the other Class members are entitled to declaratory relief.

43. ***Typicality.*** Plaintiff's claims are typical of the claims of the members of the Class in that Defendant manufactured, marketed, advertised, sold, and warranted the iPhone Devices to Plaintiff and all other members of the Class.

44. ***Adequacy of Representation.*** Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff has retained counsel highly experienced in complex consumer class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class.

45. ***Superiority.*** A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class members is relatively small compared to the burden and expense that would be entailed by individual litigation of their claims against Defendant. It would thus be virtually impossible for Class members, on an individual basis, to obtain effective redress for the wrongs done to them. Furthermore, even if Class members could afford such individualized litigation, the court system could not. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding,

economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

46. In addition, the Class may be also certified because:

- (a) the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudication with respect to individual Class members that would establish incompatible standards of conduct for Defendant;
- (b) the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and/or
- (c) Defendant has acted or refused to act on grounds generally applicable to the Class thereby making appropriate final declaratory relief with respect to the members of the Class as a whole.

47. The claims asserted herein are applicable to all consumers throughout the United States who acquired, for use and not resale, the iPhone Devices.

48. Adequate notice can be given to Class members directly using information maintained in Defendant's records or through notice by publication.

49. Damages may be calculated from the claims data maintained in Defendant's records, so that the cost of administering a recovery for the Class can be minimized. However, the precise amount of damages available to Plaintiff and the other members of the Class is not a barrier to class certification.

COUNT I

Violations of §349 of New York General Business Law: Deceptive Acts and Practices Unlawful

50. Plaintiff repeats and realleges the allegations contained in all preceding paragraphs as if fully set forth herein.

51. GBL §349 makes unlawful any “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in New York.

52. Defendant has engaged in deceptive acts and practices through misrepresentations and omissions of material facts directed at Plaintiff and members of the Class, as more fully described above, in connection with the sale of the iPhone Devices that have an inherent defect that causes the devices to slow or otherwise degrade when iOS updates are downloaded.

53. Defendant continues to fail to adequately compensate Plaintiff and Class members for the effects of their deceptive behavior.

54. Defendant’s misrepresentations and omissions are likely to mislead and did materially mislead Plaintiff and other reasonable consumers by causing them to purchase the iPhone Devices at a price they would not have otherwise paid and to incur additional damages and expenses that they would not have incurred but for Defendant’s deceptive acts and practices.

55. Defendant made numerous misrepresentations and omissions of material facts upon which Plaintiff and members of the Class relied, to their detriment.

56. The unfair and deceptive trade practices have directly, foreseeably, and proximately caused damages and injury to Plaintiff and members of the Class as described above.

57. By virtue of the foregoing, Defendant has violated GBL §349.

COUNT II

Violations of §350 of New York General Business Law: False Advertising

58. Plaintiff repeats and realleges the allegations contained in all preceding paragraphs as if fully set forth herein.

59. GBL §350 provides: "False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful."

60. Defendant's advertising of the iPhone Devices, as alleged in more detail herein, is and was false within the meaning of GBL §350-a(1).

61. Plaintiff and Class members were materially misled by Defendant's omissions in its advertising.

62. As a direct and proximate result of Defendant's false advertising, Plaintiff and Class members lost money in that they would not have purchased the iPhone Devices or would have paid less for them.

COUNT III

Breach of Express Warranty

63. Plaintiff repeats and realleges the allegations contained in all preceding paragraphs as if fully set forth herein.

64. Plaintiff and members of the Class formed a contract with Defendant at the time Plaintiff and the other Class members acquired Defendant's iPhone Devices. The terms of the contract include the promises and affirmations of fact made by Defendant on its website and through its marketing campaign that the iPhone Devices perform as advertised, even after updating the latest iOS.

65. This marketing and advertising constitutes express warranties, became part of the basis of the bargain, and is part of a standardized contract between Plaintiff and the members of the Class on the one hand and Defendant on the other.

66. Plaintiff reasonably relied upon such promises and affirmations of fact contained in Apple's marketing campaign.

67. Defendant breached the terms of this contract, including express warranties, with Plaintiff and the Class by not providing the products as advertised and described above.

68. As a result of Defendant's breach of its contract and warranties, Plaintiff and members of the Class have been damaged in the amount of the purchase price of Defendant's product.

69. All conditions precedent to Defendant's liability under this express contract, including notice, have been performed by Plaintiff and the Class.

COUNT IV

Negligent Misrepresentation

70. Plaintiff realleges and incorporates by reference the previous allegations as if fully set forth herein.

71. Defendant negligently and recklessly omitted certain material facts regarding the impact of iOS on the iPhone Devices. These omissions were contained in various advertising and marketing from Defendant, and were further reiterated and disseminated by the officers, agents, representatives, servants, or employees of Defendant acting within the scope of their authority.

72. The information withheld from Plaintiff and other Class members is material and would have been considered by a reasonable person.

73. Plaintiff and the other Class members acquired the iPhone Devices under the impression that they functioned as advertised even after downloading the latest iOS, the direct and proximate results of which were injury and harm to Plaintiff and the Class.

COUNT V

Intentional Misrepresentation

74. Plaintiff realleges and incorporates by reference the previous allegations as if fully set forth herein.

75. At all relevant times, Defendant was engaged in the business of designing, manufacturing, marketing, distributing or selling the iPhone Devices.

76. Defendant, acting through its officers, agents, servants, representatives, or employees, delivered the iPhone Devices to its own retail stores, distributors, and various other distribution channels.

77. Defendant willfully, falsely and knowingly omitted various material facts regarding the quality and character of the iPhone Devices. These omissions are contained in various advertising and marketing disseminated or caused to be disseminated by Defendant, and such omissions were further reiterated and disseminated by Defendant's officers, agents, representatives, servants, or employees acting within the scope of their authority, so employed by Defendant to merchandise and market the iPhone Devices.

78. Defendant's omissions were made with the intent that the general public, including Plaintiff and the other Class members, rely upon them. If Plaintiff and the Class had been aware of these suppressed facts, Plaintiff and the Class would not have acquired the iPhone Devices at the price sold by Defendant. In reliance upon these omissions, Plaintiff acquired the iPhone 6, as advertised by Defendant for its speed of use and for the use of Apps and other features available on iOS updates.

79. Upon information and belief, Plaintiff and the Class allege that Defendant misrepresented material facts with the intent to defraud Plaintiff and the members of the Class. The information withheld from Plaintiff and the other Class members is material and would have been considered by a reasonable person. In addition, Plaintiff and other Class members were unaware that after downloading the most recent iOS, the functionality of their devices would be compromised.

80. Plaintiff acquired the iPhone 6 under the impression that the iPhone 6 functioned as advertised after updating iOS, the direct and proximate results of which were injury and harm to Plaintiff and the Class.

COUNT VI

Unjust Enrichment

81. Plaintiff realleges and incorporates by reference the previous allegations as if fully set forth herein.

82. This claim is pled in the alternative.

83. In reliance on Defendant's false and misleading advertising campaign for the iPhone Devices, Plaintiff and members of the Class conferred a monetary benefit on Defendant.

84. Because Defendant slowed and otherwise reduced the functionality of the iPhone Devices, Plaintiff and the Class members were forced to purchase new iPhone Devices thereby conferring a monetary benefit on Defendant. As such, Defendant has been unjustly enriched at the expense of Plaintiff and the members of the Class.

85. Specifically, through its false and misleading advertising campaign, as alleged more fully herein, Defendant has unlawfully received money and other benefits at the expense of Plaintiff and the Class members.

86. Defendant's receipt and retention of this financial benefit is unfair and improper under the circumstances.

87. Therefore, Defendant should be ordered to disgorge its ill-gotten gains.

88. Plaintiff and the Class members have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, prays for relief and judgment against Defendant as follows:

A. Certification of this action as a Class Action, appointment of Plaintiff as a Class representative, and appointment of the undersigned counsel as Class counsel;

B. An order declaring the actions complained of herein to be in violation of the statutory laws set forth above, including §§349 and 350 of NYGBL;

C. An award of compensatory damages, statutory damages, restitution, and all other forms of monetary and non-monetary relief recoverable under New York Law;

D. An award of pre-judgment and post-judgment interest;

E. An award of costs, including, but not limited to, discretionary costs, attorneys' fees, and expenses incurred in prosecuting this case; and

F. Granting such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands a jury trial on all issues so triable.

DATED: January 4, 2018

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